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April 4, 2003

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1305 East-West Highway
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RE: *In the Consistency Appeal of Barnes Nursery, Inc. from an
Objection by the State of Ohio, Department of Natural Resources
United States Department of Commerce, Office of the Secretary*

Dear Ms. Holt:

Enclosed please find a copy of the **Final Brief of the State of Ohio, Department of Natural Resources** in the above referenced consistency appeal, the original of which was delivered to the Secretary of the United States Department of Commerce.

Should you have any questions, please do not hesitate to contact us.

Sincerely,

JIM PETRO
ATTORNEY GENERAL

A handwritten signature in cursive script, appearing to read "C. Frazzini", is written over the typed name of Cynthia K. Frazzini.

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**BEFORE THE UNITED STATES DEPARTMENT OF COMMERCE
OFFICE OF THE SECRETARY**

IN THE MATTER OF:
THE CZMA CONSISTENCY
APPEAL OF BARNES NURSERY, INC.

THE HONORABLE
DONALD EVANS
SECRETARY OF COMMERCE

APPEAL FROM THE CONSISTENCY OBJECTION OF
THE STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES

FINAL BRIEF OF THE STATE OF OHIO,
DEPARTMENT OF NATURAL RESOURCES

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TABLE OF CONTENTS

TABLE OF CONTENTS.....

I.	STATEMENT OF THE FACTS (UPDATE).....	2
II.	ISSUES ON APPEAL	5
A.	WHERE AN APPELLANT FAILS TO BASE ITS CONSISTENCY APPEAL ON THE GROUNDS MANDATED BY THE COASTAL ZONE MANAGEMENT ACT AND THE FEDERAL REGULATIONS PROMULGATED THEREUNDER, ANY SUBSEQUENT ATTEMPT TO CORRECT THOSE PROCEDURAL ERRORS BEYOND THE TIME PERIODS AND METHODS PRESCRIBED BY THE SECRETARY WILL FAIL, AND THE SECRETARY MAY DISMISS APPELLANT'S APPEAL FOR GOOD CAUSE	5
B.	APPELLANT'S PROPOSED ACTIVITY IS NOT CONSISTENT WITH THE OBJECTIVES AND PURPOSES OF THE COASTAL ZONE MANAGEMENT ACT AS ITS PROPOSED ACTIVITY FAILS TO SATISFY ANY ONE OF THE THREE REQUIREMENTS UNDER 15 CFR 930.121.	9
1.	Appellant's proposed activity does not further the national interest as articulated in §302 or §303 of the Coastal Zone Management Act in a significant or substantial manner.....	12
2.	The minimal national interest allegedly furthered by Appellant's proposed activity can not begin to outweigh the proposed activity's adverse coastal effects, when those effects are considered separately or cumulatively..	18
3.	There are reasonable alternatives available which would permit Appellant's proposed activity to be conducted in a manner consistent with Ohio's Coastal Management Program.....	34
III.	CONCLUSION.....	45
	CERTIFICATE OF SERVICE	47

I. STATEMENT OF THE FACTS (UPDATE)

As discussed in the State's Initial Brief, which is incorporated into the State's Final Brief as if fully rewritten herein, this Appeal arose when Appellant Barnes Nursery, Inc. ("Barnes Nursery") filed its Notice of Appeal from the June 11, 2001 Consistency Objection of the State of Ohio, Department of Natural Resources ("the State" or "ODNR") with the Secretary of the United States Department of Commerce ("the Secretary") by letter dated July 10, 2001

In his letter of August 6, 2001, the Secretary set forth the initial briefing schedule of this matter pursuant to 15 CFR 930.127(a). After a number of requests for extensions of time were filed by the parties, and granted by the Secretary, Barnes Nursery filed a Request for Stay and Remand pursuant to 15 CFR 930.129(c)(3) and (d), without objection by the State, on May 3, 2002. On August 6, 2002, the Secretary denied Appellant's Request for Stay and Remand and directed that Barnes Nursery file its "Initial Brief and supplementary information" with the Secretary by "no later than" September 4, 2002, with the State's Initial Brief being due within 30 days of its receipt of "Appellant's Brief and supplemental materials." (Administrative Record, NOAA's Decision to Appellant's Request for a Stay and Remand, August 6, 2002) Appellant filed its Initial Brief and supporting materials with the Secretary on September 4, 2002. (Administrative Record, Appellant's Initial Brief, September 4, 2002) The State received Appellant's Initial Brief and supporting materials on September 5, 2002 and filed the State's Initial Brief and supporting materials with the Secretary on October 4, 2002. (Administrative Record, State of Ohio's Initial Brief, October 4, 2002)

On October 10, 2002, the State filed a Request for Extension of the Public Comment Period pursuant to 15 CFR 930.128(d), requesting that the minimum thirty (30) day public comment period required by 15 CFR 930.128(b) be extended to a sixty (60) day public comment

period. This Request, unopposed by Appellant, was granted. On October 23, 2002, notice of the public comment period was published in the *Federal Register*, the *Sandusky Register*, and the *Lorain Morning Journal* pursuant to 15 CFR 930.128(b). (Administrative Record, Federal Register Notice of Federal Consistency Appeal by Barnes Nursery, Inc., October 23, 2002) "Numerous comments on this appeal were received from the public." (Administrative Record, Final Briefing Schedule, January 29, 2003)

On December 3, 2002, Appellant Barnes Nursery submitted an eight page letter with 17 attached Appendices (referenced on the Administrative Record as "Appellant's Supplemental Information, December 3, 2002") and four separate attachments (referenced on the Administrative Record as "Appellant's Supplemental Information - Attachment #1, Appellant's Supplemental Information - Attachment #2, Appellant's Supplemental Information - Attachment #3, and Appellant's Supplemental Information - Attachment #31, all dated December 3, 2002).

Appellant's Supplemental Information - Attachment #1 was 30 pages in length and was described by Barnes Nursery as "letters that were sent either to the Corps, Ohio EPA or political figures on [Barnes Nursery's] behalf." (Administrative Record, Appellant's Supplemental Information - Attachment #1, December 3, 2002) Appellant's Supplemental Information Attachment #2 was 16 pages in length and was entitled "Report of Barnes Nursery East Sandusky Bay Hydrology Restoration Project, Prepared by TRC Environmental ... November 8, 2001." (Administrative Record, Appellant's Supplemental Information - Attachment #2, December 3, 2002)

Appellant's Supplemental Information - Attachment #3 was 46 pages in length and was entitled "Phase I Cultural Resources Investigations of the East Sandusky Bay Hydrology Restoration Project in Erie County, Ohio, Prepared for: Barnes Nursery, Inc., Prepared by: Gray

& Pape, Inc." (Administrative Record, Appellant's Supplemental Information - Attachment #3, December 3, 2002) Appellant's Supplemental Information - Attachment #31 was 31 pages in length and was entitled "Wetland Inventory, Survey, and Mapping Report for the Barnes Nursery Huron, Ohio, November 2001, Prepared for: Barnes Nursery, Inc. .. Prepared by: Chagrin Valley Engineering, Ltd." (Administrative Record, Appellant's Supplemental Information - Attachment #31, December 3, 2002) Appellant failed to serve copies of Appellant's Supplemental Information and Attachments #1, #2, #3, and #31 upon the State as required by 15 CFR 930.127(b).

On December 10, 2002, the Secretary solicited comments on this appeal from five federal agencies including the United States Army Corps of Engineers ("the Corps"), the United States Fish and Wildlife Service ("USFWS"), and the United States Environmental Protection Agency ("USEPA"), pursuant to 15 CFR 930.128(c). (Administrative Record, Letters to Federal Agencies Requesting Comments Concerning Barnes Nursery, Inc. Appeal, December 10, 2002) Both USFWS and USEPA responded to the Secretary's request and provided their respective comments on December 27, 2002 and January 28, 2003. (Administrative Record, U.S. Fish & Wildlife Service Response to Request for Comments, December 27, 2002; U.S. Environmental Protection Agency Response to Request for Comments, January 28, 2003)

Pursuant to 15 CFR 930.127(a), the Secretary set forth the Final Briefing Schedule for this appeal by letter dated January 29, 2003. (Administrative Record, Final Briefing Schedule, January 29, 2003) The Final Briefing Schedule provided that "[t]he public comment period for this appeal has closed ... [t]he public comments may be viewed on our website www.ogc.doc.gov/czma.htm" and that "the parties have 30 days from receipt of this letter to file final briefs addressing matters that are in the record." (Administrative Record, Final Briefing

Schedule, January 29, 2003) The State received the Final Briefing Schedule on January 31, 2003. After its receipt of the Final Briefing Schedule, the State, following the Secretary's instructions regarding its website, discovered the December 3, 2002 filing of Appellant's Supplemental Information and Attachments #1, #2, #3, and #31. The State notified the Secretary that it had not been served with Appellant's Supplemental Information and Attachments #1, #2, #3, and #31. The Secretary mailed copies of Appellant's Supplemental Information and Attachments #1, #2, #3, and #31 to the State and extended the deadline for submission of final briefs to April 7, 2003 for both the State and Barnes Nursery, in order to allow the State additional time to review this new information. (Administrative Record, Letters Extending Final Briefing Schedule, February 14, 2003)

II. ISSUES ON APPEAL

A. WHERE AN APPELLANT FAILS TO BASE ITS CONSISTENCY APPEAL ON THE GROUNDS MANDATED BY THE COASTAL ZONE MANAGEMENT ACT AND THE FEDERAL REGULATIONS PROMULGATED THEREUNDER, ANY SUBSEQUENT ATTEMPT TO CORRECT THOSE PROCEDURAL ERRORS BEYOND THE TIME PERIODS AND METHODS PRESCRIBED BY THE SECRETARY WILL FAIL, AND THE SECRETARY MAY DISMISS APPELLANT'S APPEAL FOR GOOD CAUSE.

The federal regulations under the Coastal Zone Management Act ("CZMA") set forth "the procedures by which the Secretary may find that a federal license or permit activity ... which a State agency has found to be inconsistent with the enforceable policies of [that State's] management program, may be federally approved because the activity is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security." 15 CFR 930.120. As established in the State's Initial Brief, Barnes Nursery utterly failed "to base its appeal on grounds that the proposed activity is either consistent with the objectives and purposes

of the Act, or necessary in the interest of national security." (Administrative Record, State's Initial Brief, October 4, 2002, pgs. 12-16; 15 CFR 930.129(a)(5)) Therefore, it was respectfully submitted in the State's Initial Brief that the Secretary should dismiss this appeal for good cause pursuant to 15 CFR 930.129(a)(5).

It now appears that Barnes Nursery has presented the Secretary with a second basis for dismissal of its appeal for good cause. Under CZMA regulations, the Appellant and the State must submit their respective briefs and supporting materials within the required period of scheduled dates and times established by the Secretary. 15 CFR 930.127(a) In fact, "failure of the appellant to submit a brief or supporting materials within the required period" is one of the five bases under which the Secretary may dismiss an appeal for good cause. 15 CFR 930.129(a)(2) (emphasis added) This was well known to Barnes Nursery even before it filed its Initial Brief and supporting materials.

On August 6, 2002, the Secretary directed that Barnes Nursery file its "Initial Brief and supplementary information" by September 4, 2002. (Administrative Record, NOAA's Decision to Appellant's Request for a Stay and Remand, August 6, 2002) Almost prophetically, given Barnes Nursery's later actions, the Secretary also warned Barnes Nursery of the possible repercussions to its appeal in the event that it failed to comply with the briefing schedule established by the Secretary as follows:

"Appellant's initial brief and supplementary information must be filed in this office no later than 30 days from today or September 4, 2002. The Appellant should be mindful that failure to submit a brief or supporting materials within the required time period is grounds for dismissal. 15 CFR 930.129(a)(2)."

(Administrative Record, NOAA's Decision to Appellant's Request for a Stay and Remand, August 6, 2002, emphasis added) Therefore, prior to the filing of its Initial Brief, Barnes Nursery was given not only clear instructions regarding what was to be filed with the Secretary

(Initial Brief and supplemental information), but also clear notice of the consequences for failure to comply with the time period for those submissions (dismissal of its appeal).

Barnes Nursery filed an Initial Brief and supporting materials with the Secretary on September 4, 2002. (Administrative Record, Appellant's Initial Brief, September 4, 2002) Yet, on December 3, 2002, without notice to the State and contrary to law, Barnes Nursery filed on the Administrative Record of this appeal "Appellant's Supplemental Information, Appellant's Supplemental Information - Attachment #1, Appellant's Supplemental Information - Attachment #2, Appellant's Supplemental Information - Attachment #3, and Appellant's Supplemental Information - Attachment #31." (Administrative Record, December 3, 2002, hereinafter referred to collectively as "12/02 Supporting Materials")

Barnes Nursery's 12/02 Supporting Materials were never served upon the State as required by 15 CFR 930.127(b). This fact is particularly striking given that every other document filed in this appeal has been served upon the State in accordance with CZMA regulations. Equally odd, Barnes Nursery's 12/02 Supporting Materials show no evidence of being prepared by the counsel of record for Appellant, but rather display the letterhead of Barnes Nursery, Inc. and bear the signatures of its owners. (Administrative Record, Appellant's Supplemental Information, December 3, 2002) Most significantly, Barnes Nursery's 12/02 Supporting Materials were submitted to the Secretary three months after the deadline for submission of Appellant's supporting materials as dictated by the Briefing Schedule established by the Secretary pursuant to the mandates of 15 CFR 930.127(a).

Though the State will not presume to know why Barnes Nursery would engage in such a flagrant violation of the CZMA regulations, the State would submit on the basis of the contents of the 12/02 Supporting Materials that Barnes Nursery's intention was to correct the potentially

fatal procedural deficiencies of its Initial Brief and supporting materials which were discussed extensively in the State's Initial Brief. (Administrative Record, State's Initial Brief, October 4, 2002, pgs. 12-16) Having failed to base its appeal in its Initial Brief and supporting materials on either of the only two grounds provided under the CZMA statutory and regulatory provisions within the time period established by the Secretary pursuant to 15 CFR 930.127(a), Barnes Nursery cannot raise issues for the first time, factual or legal, during the public comment period, months after the deadline for submission of Appellant's supporting materials.

Regardless of the intention behind Barnes Nursery's attempted circumvention of the express mandates of CZMA regulations, that attempt must fail. Barnes Nursery's filing of its 12/02 Supporting Materials is an express violation of the CZMA regulations and the required time periods for submission of supporting materials established by the Secretary in this appeal. 15 CFR 930.127(a) explicitly provides that "the Secretary shall establish a schedule of dates and time periods for submission of briefs and supporting materials by the appellant and the State agency." 15 CFR 930.127(a) Barnes Nursery can not argue that it had a right to file supplemental information regarding its own appeal during the public comment period of that appeal. Public comment periods for CZMA appeals are conducted in accordance with 15 CFR 930.128. 15 CFR 930.128 provides that "the public shall be afforded no less than 30 days to comment on the appeal." There is no right afforded by 15 CFR 930.128 to either the Appellant or the State to file comments during the public comment period. This is because, with regard to its own appeal, Appellant Barnes Nursery is not "the public," and an appellant's times and methods of response are dictated by federal law, specifically, by 15 CFR 930.127(a) and the schedule established by the Secretary thereunder.

Because Barnes Nursery has violated the schedule established by the Secretary pursuant to 15 CFR 930.127(a) in the filing of its 12/02 Supporting Materials, the State of Ohio respectfully submits that its appeal should be dismissed for good cause, or, at a minimum, the contents of Barnes Nursery's 12/02 Supporting Materials should be disregarded by the Secretary and stricken from the Administrative Record. This is not simply a matter of procedural form over substance. The Secretary's countenance of Barnes Nursery's tactics would set a dangerous precedent for future CZMA Appeals from the Objections of, not only the State of Ohio, but all coastal states with federally approved coastal management programs. These states must rely upon and are bound by the decisions of the Secretary in the interpretation of CZMA regulations in both procedural and substantive matters of law.

B. APPELLANT'S PROPOSED ACTIVITY IS NOT CONSISTENT WITH THE OBJECTIVES AND PURPOSES OF THE COASTAL ZONE MANAGEMENT ACT AS ITS PROPOSED ACTIVITY FAILS TO SATISFY ANY ONE OF THE THREE REQUIREMENTS UNDER 15 CFR 930.121.

As established in the State's Initial Brief, Barnes Nursery failed to meet its burden of proof in its Initial Brief and supporting materials, and as established above, the filing of the 12/02 Supporting Materials by Barnes Nursery, a blatant violation of CZMA regulations, can not serve to remediate the inadequacies of that Initial Brief and supporting materials. It has been found by the Secretary that "the Appellant bears both the burden of proof and the burden of persuasion in Consistency Appeals." *Shickrey Anton Appeal, supra* at 12. Thus, the burden of going forward has not shifted to the State and Barnes Nursery's Appeal should be dismissed. Nevertheless, in the extraordinary event that the Secretary would actually consider the contents of Barnes Nursery's 12/02 Supporting Materials, the State offers this final briefing on the issues set forth in the Administrative Record subsequent to the filing of its Initial Brief.

It should be noted that of all the items composing the 12/02 Supporting Materials, only the eight page letter, referenced on the Administrative Record as simply "Appellant's Supplemental Information," contains relevant, new information not previously submitted in prior filings and subsequently rebutted by the State in its Initial Brief. Specifically, the letters contained in Appellant's Supplemental Information - Attachment #1 are irrelevant to this appeal, as they "fail to address the statutory and regulatory grounds upon which [the Secretary's] decision must be based," and therefore they will not be considered by the Secretary. *In the Consistency Appeal of Yeamans Hall Club from an Objection by the South Carolina Coastal Council, U.S. Department of Commerce, Office of the Secretary*, 1992 NOAA LEXIS 50 (August 1, 1992), note 9.

Appellant's Supplemental Information - Attachment #3 regarding "Cultural Resources" is both irrelevant to this appeal and has already been placed on the Administrative Record. (Administrative Record, Appellant's Supplemental Materials in Support of Stipulation for Stay and Remand, May 23, 2002, Exhibit 6) As was explained in the State's Initial Brief, on November 7, 2001, the Ohio Historical Society issued its finding under Ohio Coastal Management Program ("OCMP") Policy 26 - Preservation of Cultural Resources, and found that no historic properties would be affected by Barnes Nursery's proposed activity. (Administrative Record, State's Initial Brief, pg. 10) Therefore, Barnes Nursery's project is not inconsistent with OCMP Policy 26 and that basis was removed from the State's Objection. (Administrative Record, State's Initial Brief, pg. 10)

Barnes Nursery's consultant's reports contained in Appellant's Supplemental Information - Attachments #2 and #3 were also previously submitted on the Administrative Record of this appeal in various forms. (Administrative Record, Appellant's Supplemental Materials in Support

of Stipulation for Stay and Remand, May 23, 2002, Exhibits 1, 3, 4, and 5; Appellant's Initial Brief, September 4, 2002, Exhibits 4 and 5) Therefore, as Appellant's Supplemental Information

Attachments #1, #2, #3 and #31 are either irrelevant or are already matters on the record to which the State responded in its Initial Brief, the State will only respond in its Final Brief to the new information contained within the eight page letter of Barnes Nursery dated December 3, 2002 ("Barnes Letter").

The federal consistency appeal process before the Secretary "is a de novo determination based on the statutory standards of the CZMA and its implementing regulations." *In the Consistency Appeal of Shickrey Anton from an Objection by the South Carolina Coastal Council*, U.S. Department of Commerce, Office of the Secretary, 1991 NOAA LEXIS 56 (May 21, 1991), at 8-9. The Secretary may only override the State's Objection if the Secretary determines that an appellant has submitted sufficient evidence in its Consistency Appeal to meet either one of the two statutory grounds for override provided in the CZMA. These grounds are that the proposed activity is either: (1) consistent with the objectives or purposes of the CZMA, or (2) necessary in the interest of national security. 16 USCA Section 1456 (C)(3)(A) (CZMA § 307); 15 CFR 930.121-122. "[W]ithout sufficient evidence, the Secretary will decide in favor of the State." *Shickrey Anton Appeal, supra* at 11

With regard to the first ground, which the Secretary has presumed to be the basis of this appeal absent any contrary indication from Appellant, a proposed activity requiring a federal permit may be deemed consistent with the objectives and purposes of the CZMA if it meets all three of the following requirements:

- (1) The activity furthers the national interest, as articulated in § 302 or § 303 of the Act, in a significant or substantial manner;

- (2) The national interest furthered by the activity outweighs the activity's adverse coastal effects, when those effects are considered separately or cumulatively;
- (3) There is no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the enforceable policies of the [State's federally approved] management program.

15 CFR 930.121.

Barnes Nursery continues to fall decidedly short of meeting this burden. Even construing the opinions expressed in Appellant's Initial Brief and supporting materials, as well as those in the Barnes Letter, in a light most favorable to Barnes Nursery, its claims fail to meet any one of the three federal requirements which must all be met before the Secretary may issue a decision overriding the State's Objection. Therefore, the Secretary should render a decision refusing to override the State of Ohio's Objection in this appeal.

1. **Appellant's proposed activity does not further the national interest as articulated in §302 or §303 of the Coastal Zone Management Act in a significant or substantial manner.**

To qualify for a federal override of a State Objection, an appellant must first prove that its proposed activity substantially furthers one or more of the competing national objectives or purposes contained in §§ 302 or 303 of the CZMA. 15 CFR 930.121(a) Therefore, "while a proposed activity may further a national interest beyond the scope of the national interests recognized in or defined by the objectives or purposes of the Act, such a national interest may not be considered" by the Secretary in a CZMA Consistency Appeal. *Shickrey Anton Appeal*, *supra* at 20. Additionally, an appellant must establish that its proposed activity furthers that defined national interest in a significant or substantial manner. 15 CFR 930.121(a)

In its Initial Brief, Barnes Nursery does not identify which, if any, national interest expressly stated in the CZMA is furthered by its proposed activity. Nor does Barnes Nursery

offer evidence to support that its activity would further an objective or purpose of the Act in a significant or substantial manner. In the Barnes Letter, Barnes Nursery again fails to identify or offer evidence to support that its project would significantly or substantially further any national interest provided in §§ 302 or 303 of the CZMA.

Instead, in the only segment of the Barnes Letter purporting to address the subject, under the heading "How does this project benefit the 'national interest'?", Barnes Nursery provides a five paragraph overview of its business and its contributions to the local community. (Administrative Record, Appellant's Supplemental Information, December 3, 2002, pgs. 6-7) In the sixth paragraph thereunder, Barnes Nursery discusses its alleged concerns over Lake Erie water levels "prior to the implementation of the channel" and provides that it "constructed the channel in preparation for the low water predictions, and they came true." (Administrative Record, Appellant's Supplemental Information, December 3, 2002, pg. 7) In the seventh and final paragraph Barnes provides as follows:

"Our company believes that our agreement to place 32 acres of prime coastal property (both marsh and upland) into a permanent conservation easement, held by a third party agreeable to the Corps, is in the best national interest ... This easement will give the public permanent protection from the future potential of development in that area."

(Administrative Record, Appellant's Supplemental Information, December 3, 2002, pg. 7)

The statements made by Barnes Nursery in the sixth and seventh paragraph of the Barnes Letter quoted above are interesting for several reasons. First, the statements are utterly devoid of any claimed benefit or enhancement to the wetlands, which has been touted by Barnes Nursery in its past submissions as the secondary purpose of the project after the primary purpose of water supply for its Nursery Operations. CZMA § 303 does provide that it is in the national interest "where possible, to restore or enhance the resources of the Nation's coastal zone." CZMA §

303(1) However, Barnes Nursery has failed to identify that its project even falls into that statutory category. Further, even if Barnes Nursery had alleged that its proposed activity furthered this national interest in a significant or substantial manner, that allegation would be wholly unsupported and entirely controverted by the comments of all Federal and State agencies on the Administrative Record.

Second, the statement pertaining to water levels indicates an erroneous belief on the part of Barnes Nursery that it is entitled to use of the waters of Lake Erie, which it does not possess under Ohio law. In Ohio, a littoral owner possesses littoral rights which may be exercised within Lake Erie, subject and subservient to the power and authority of the State and Federal government. *State v. Cleveland & Pittsburgh Railroad Company* (1916), 94 Ohio St. 61; *State ex rel. Squire v. Cleveland* (1948), 150 Ohio St. 303. If Barnes Nursery was a littoral owner, it would possess littoral rights under Ohio law, including the right to reasonable use of waters flowing past its lands. *State v. Cleveland & Pittsburgh Railroad Company, supra*; *State ex rel. Squire v. Cleveland, supra*; *Thomas v. Sanders* (1979), 65 Ohio App. 2d 5; *Lemley v. Stevenson* (1995), 104 Ohio App. 3d 126, dismissed, appeal not allowed, 74 Ohio St. 3d 1417, reconsideration denied 74 Ohio St. 3d 1465; *Schnittker v. Ohio Department of Natural Resources* (2001), 2001 Ohio App. LEXIS 1828, dismissed, appeal not allowed, 93 Ohio St. 3d 1411 reconsideration denied, 93 Ohio St. 3d 1464. However, Barnes Nursery is not a littoral owner under Ohio law.

A littoral owner is defined under Ohio law as an owner of real property which borders Lake Erie. *State v. Cleveland & Pittsburgh Railroad Company, supra*; *State ex rel. Squire v. Cleveland, supra*; *Thomas v. Sanders, supra*; *Lemley v. Stevenson, supra*; *Schnittker v. Ohio Department of Natural Resources, supra*. However, Barnes Nursery asserts in the Barnes Letter,

that the portion of East Sandusky Bay which lies north of Barnes Nursery and south of Lake Erie, "was owned by a hunting and fishing club prior to it being acquired by Wildlife Realty who sold the property to the State of Ohio." (Administrative Record, Appellant's Supplemental Information, December 3, 2002, pg. 4)

The Ohio Supreme Court long ago determined that the lands of East Sandusky Bay north of Barnes Nursery's property were privately owned. In the case of *The East Bay Sporting Club v. Miller*, the Plaintiff, East Bay Sporting Club ("the Club"), claimed that it was the owner of the property bordering Lake Erie north of what is today Barnes Nursery's property, which was described then, much as it is today - "marsh lands, part of which is dry land and part covered by water." *The East Bay Sporting Club v. Miller, et al.* (1928), 118 Ohio St. 360, 361. The Club's ownership of the subject lands, submerged and unsubmerged, was undisputed. Accordingly, the Court upheld the following facts regarding the Club's property:

"... that plaintiff owns the premises in question in fee simple; that the same are marsh lands, through which run the creeks known as Black Channel and Plum Brook, and that the west line of said premises is the west line of Huron township; that said line is the east end of Sandusky Bay ...The validity of the title of plaintiff in error to the property described in the petition up to the west line of Huron township is conceded ... the ownership of this property up to the west line of Huron township is recognized in both *Teasel v. West Huron Sporting Club* and *Stroud v. West Huron Sporting Club, supra.*"

The East Bay Sporting Club v. Miller, supra at 363. Therefore, under the current law relating to this site, Barnes Nursery is not a littoral owner and does not possess littoral rights. Barnes Nursery is an inland owner. Its property does not border Lake Erie.

It is the Club's property, which was passed down the chain of title until it was acquired by the State and dedicated as part of Sheldon Marsh State Nature Preserve ("the Preserve"), that is the littoral property at this site. It is also because of the dedication of this property that the State is not permitted under Ohio law to grant permission for Barnes Nursery's proposed activity to

cross its State nature preserve. (Ohio Revised Code Chapter 1517) Barnes Nursery remains obstinate on this point. This is not, as Barnes Nursery asserts, an opinion "according to ODNR officials," this is the law according to the legislature of Ohio, by which ODNR is bound. (Administrative Record, Appellant's Supplemental Information, December 3, 2002, pg. 5; Ohio Revised Code Chapter 1517)

Though the project site is located within Ohio's designated Coastal Area as defined in Ohio's federally approved OCMP Document, the project site is not taking place upon littoral property. Ohio's Coastal Area encompasses a number of wetlands and coastal areas that do not immediately border Lake Erie. Not every property regulated under the OCMP is littoral property. If Barnes Nursery's property had been littoral property, then its northern boundary by operation of Ohio law would be the Ordinary High Water Mark of Lake Erie and the project site would be located in the State's territory of Lake Erie. If that had been the case, the project would have been subject to even further review and would have required additional authorizations by the State, including but not limited to, a Submerged Land Lease pursuant to R.C. 1506.11 and a Shore Structure Permit pursuant to R.C. 1521.22. However, as Barnes Nursery is apparently aware, its property is inland of and adjacent to the littoral property at this site, which is now owned by the State of Ohio.

Third, Barnes Nursery's final statement regarding a proposed conservation easement contains one of three references in the Barnes Letter to "future development" of this area. (Administrative Record, Appellant's Supplemental Information, December 3, 2002, pgs. 4, 7, 8) Specifically, in addition to this reference, Barnes Nursery states the following regarding "future development" of the lands south of the State Nature Preserve:

"The vegetated islands would provide additional protection from views of future development in the upland areas just south of the State Nature Preserve."

"And the islands would further provide the State Nature Preserve an additional natural barrier from any future development in the uplands to the south of the project area."

(Administrative Record, Appellant's Supplemental Information, December 3, 2002, pgs. 4, 8)

The lands to the south of the proposed project area are owned by Barnes Nursery and three other inland property owners whose properties are located west of Barnes Nursery and south of the Preserve. As described in the State's Initial Brief, these property owners identified themselves as the applicant "CCCMB" on the application for the first peculiar and erroneously issued Corps permit for this project. (Administrative Record, State's Initial Brief, pgs. 4-5) The other member of CCCMB, Cedar Fair, is a littoral property owner whose property is located west and northwest of the State Nature Preserve, not south of it. (Administrative Record, State's Initial Brief, pgs. 4-5)

Certainly property owners in the State of Ohio have the right to use their property in any way permissible under law. However, if the development of the properties owned by Barnes Nursery and the other members of CCCMB is as certain as Barnes Nursery's 12/02 Supporting Materials would indicate, the obvious question becomes - why would Barnes Nursery need to construct a channel for the stated purpose of agricultural water supply? The State must presume that Barnes Nursery's stated purpose for its proposed activity is true and accurate. Therefore, the question now becomes - does Barnes Nursery need to construct its project in order to obtain sufficient water supply for its nursery? The answer, as will be discussed in the final section of this brief regarding reasonable alternatives, is that it does not.

Finally, while it may be Barnes Nursery's belief that the permanent conservation easement required of Barnes Nursery by the Corps in its provisional permit is "in the best national interest," that has not been the finding of the Secretary in past Consistency Appeals.

(Administrative Record, Appellant's Supplemental Information, December 3, 2002, pg. 7) This has been particularly true where the wetlands at issue are already within the Coastal Zone of a particular coastal state and therefore already protected by that state's federally approved Coastal Management Program.

The Corps Provisional Permit provides for a conservation easement to be placed over the remaining wetlands existing on Appellant's property in order to mitigate adverse effects caused by Barnes Nursery's proposed activity. (Administrative Record, State's Initial Brief, Provisional Permit, Exhibit R, Special Condition 14) However, the Secretary has found that adverse effects to wetlands will not be deemed to be mitigated by "preserving the remaining wetlands on the property 'in perpetuity through either covenants on the land or through a gift to a land conservation organization'" where "the wetlands are within the protection of the State's Coastal Management Program" and thus "it is unclear how much more protection such mitigation would offer." *Shickrey Anton Appeal, supra* at 14. This is particularly true given the facts of this Appeal where the proposed activity never would have been authorized and, therefore never would have begun, had Barnes Nursery's application been processed by the Corps through the normal and proper procedures set forth in the OCMP, the CZMA and the regulations thereunder.

As established above, Barnes Nursery's project does not further any national interest articulated in § 302 and § 303 of the CZMA in a significant or substantial manner. Therefore, Barnes Nursery has failed to meet the first requirement for Secretarial override, and the Secretary must refuse to override the State's Objection.

2. The minimal national interest allegedly furthered by Appellant's proposed activity can not begin to outweigh the proposed activity's adverse coastal effects, when those effects are considered separately or cumulatively.

Barnes Nursery's proposed activity also fails to meet the second requirement which must be met for override and which requires that the Secretary "identify the adverse effects of the objected to activity on the natural resources of the coastal zone and then determine whether those effects are substantial enough to outweigh the activities' contribution to the national interest." *In the Consistency Appeal of Michael P. Galgano from an Objection by the New York Department of State*, U.S. Department of Commerce, Office of the Secretary, 1990 NOAA LEXIS 48 (October 29, 1990), at 11-12 "In evaluating the adverse effects of the project on the natural resources of the coastal zone," the Secretary "must consider the adverse effects of the project by itself and in combination with other past, present or reasonably foreseeable activities affecting the coastal zone." *Michael P. Galgano Appeal, supra* at 11-12. In reviewing the adverse effects of a proposed activity under the CZMA, the Secretary will consider the amount of wetland loss associated with the project. *Shickrey Anton Appeal, supra* at 14. "The quantity of wetland loss, however, is not the only factor the Department will consider in evaluating adverse effects on the environment. Other factors may include, but are not limited to, the nature of the wetland loss and the effects of the wetland loss on the remaining ecosystem." *Shickrey Anton Appeal, supra* at 14.

Barnes Nursery's assertion that its proposed activity will restore or enhance the condition of the wetlands at issue continues to meet with no agreement from any Federal or State agency, with the possible exception of the Corps, which chose to file no comments with the Secretary regarding this appeal. To the contrary, USEPA, USFWS, Ohio EPA and ODNR have all found and continue to find, without exception, that the activity proposed by Barnes Nursery will provide no benefit to the wetlands complex it allegedly seeks to enhance, and instead will result in the damage to this rare stretch of Category 3, naturally functioning wetlands. (Administrative Record, State's Initial Brief, USEPA Letter, June 7, 2001, Exhibit T; USFWS Letter June 11,

2001, Exhibit E; Ohio EPA Proposed Denial, Exhibit S; State's Objection, Exhibit B; U.S. Fish & Wildlife Service Response to Request for Comments, December 27, 2002 and U.S. Environmental Protection Agency Response to Request for Comments, January 28, 2003; see also State's Final Brief, Ohio EPA Interoffice Memo, March 25, 2003, Exhibit AA, ODNR Division of Geological Survey Memo, April 2, 2003, Exhibit DD, ODNR Division of Natural Areas and Preserves Memo, March 13, 2003, Exhibit EE, ODNR Division of Water Memo, March 12, 2003, Exhibit FF)

Therefore, in accordance with past decisions of the Secretary, Barnes Nursery's proposed activity should be found to "contribute minimally, if at all, to the national interest," see *In the Consistency Appeal of Henry Crosby from an Objection from the State of South Carolina, South Carolina Coastal Council*, U.S. Department of Commerce, Office of the Secretary, 1992 NOAA LEXIS 46 (December 29, 1992), at 20 (finding that the national interests purportedly furthered by Appellant's proposed activity of permanently altering wetlands for "waterfowl management," "protection of wildlife and their habitat" and "enhancement of coastal zone resources," were of minimal contribution to the national interest where the State, USFWS and USEPA had all provided comments indicating that Appellant's project would not enhance the resource.)

Even if Barnes Nursery's proposed activity did further a national objective articulated in the CZMA, that interest could not begin to outweigh the separate and cumulative adverse impacts that Barnes Nursery's partially completed, unauthorized project has had and will have on the wetlands complex it has bisected and the dedicated State nature preserve it borders.

As provided in the State's Initial Brief, the Federal and State agencies have supplied numerous comments detailing the unique and invaluable resource that is Sheldon Marsh, and detailing their joint concerns over the adverse impacts to that rare and natural resource posed by

the artificial changes inflicted upon and proposed by Barnes Nursery. These comments have been further supplemented during the Federal Agency comment period and during the State's response time extended by the Secretary following the improper filing of Barnes Nursery's 12/02 Supporting Materials. Taken together, these Federal and State agency comments rebut the assertions of Barnes Nursery and clearly exhibit the adverse impacts inflicted upon this Category 3 wetland by Appellant's partially constructed and proposed activity, making evident that such impacts are not outweighed by any national interest Barnes Nursery may attempt to assert.

The USFWS "has been involved with this project from the beginning, and continues to have a strong interest in the outcome of this project." (Administrative Record, State's Initial Brief, USFWS Letter, June 11, 2001, Exhibit E) In addition to the five letters and other informal email communications that USFWS had submitted to the Corps regarding this project prior to the filing of this Appeal, USFWS was the first federal agency to respond with a detailed four page letter to the Secretary's request for comments pursuant to 15 CFR 930.128(c). (Administrative Record, State's Initial Brief, USFWS Letter, August 21, 2000, Exhibit C; USFWS Letter, October 13, 2000, Exhibit U; USFWS Letter, June 11, 2001, Exhibit E; USFWS Letter, July 30, 2001, Exhibit V; USFWS Letter, September 28, 2001, Exhibit W; and U.S. Fish & Wildlife Service Response to Request for Comments, December 27, 2002) In its comments on this Appeal to the Secretary, USFWS remains the staunch defender of the critical habitat produced by this category 3 wetlands complex. (U.S. Fish & Wildlife Service Response to Request for Comments, December 27, 2002)

As also discussed in the State's Initial Brief, USEPA had provided a number of comments critical of Barnes Nursery's proposed activity. (Administrative Record, State's Initial Brief, pgs. 21 and 25, USEPA Letter, June 7, 2001, Exhibit T, USEPA Letter, October 12, 2000, Exhibit D) When the Secretary requested comments from USEPA regarding this appeal, USEPA responded

with comments maintaining its position that Barnes Nursery's proposed activity does not meet the provisions of the Clean Water Act and that the project area should be restored. (Administrative Record, U.S. Environmental Protection Agency Response to Request for Comments, January 28, 2003)

As described in the State's Initial Brief, Ohio EPA had consistently expressed its concerns from the moment that it learned construction was taking place in this Category 3 wetland without its authorization, and issued a proposed denial of Barnes Nursery's 401 Water Quality Application. (Administrative Record, State's Initial Brief, pgs. 21-22, Ohio EPA Proposed Denial, Exhibit S) This proposed denial was appealed by Barnes Nursery and was set for hearing on April 7, 2003. Ohio EPA is the State agency networked into the OCMP with the strongest applicable enforceable authorities over Barnes Nursery's proposed activity at issue. (Administrative Record, State's Initial Brief, pgs. 10-11) ODNR requested and received comments from Ohio EPA through the OCMP in response to the improperly filed Barnes Letter. (State's Final Brief, Ohio EPA Interoffice Memo, March 25, 2003, Exhibit AA)

Ohio EPA's comments were limited at that time due to Barnes Nursery's pending appeal of its Proposed Denial. Surprisingly, on March 28, 2003, Barnes Nursery filed a one sentence "Prehearing Statement" with Ohio EPA stating that "Barnes Nursery, Inc. hereby gives notice that it does not intend to prosecute its appeal." (State's Final Brief, Barnes Nursery, Inc.'s Prehearing Statement, March 28, 2003, Exhibit BB) Thereafter, Barnes Nursery made statements to the press that it disputes "the state's findings on the wetlands," that Barnes Nursery has "done nothing negative to impact" the wetlands, and that "the company hopes to continue using the ditch." (State's Final Brief, *Toledo Blade* and *Sandusky Register* newspaper articles, April 1, 2003, Exhibit CC) As of the date of this Final Brief, no final action has been taken by Ohio EPA regarding

Barnes Nursery's "Prehearing Statement" and the State of Ohio, Department of Natural Resources has received no verbal or written communication from Barnes Nursery, Inc. indicating that it intends to dismiss this appeal before the Secretary. Accordingly, the State has proceeded in accordance with the mandates of the CZMA and its corresponding regulations.

ODNR also requested and received comments through the OCMP process from its internal divisions in response to the improperly filed Barnes Letter. (State's Final Brief, ODNR Division of Geological Survey Memo, April 2, 2003, Exhibit DD, ODNR Division of Natural Areas and Preserves Memo, March 13, 2003, Exhibit EE, and ODNR Division of Water Memo, March 12, 2003, Exhibit FF) While all of the comments of USFWS, USEPA, Ohio EPA and ODNR are incorporated into the State's Final Brief as if fully rewritten herein, the State will expressly cite herein to those portions of the Federal and State agency comments which are most relevant to rebut the erroneous allegations contained within the Barnes Letter.

Appellant begins the Barnes Letter declaring that its unauthorized project is located entirely on private property. (Administrative Record, Appellant's Supplemental Information, December 3, 2002, pg. 2) This claim ignores three important facts. First, the project's berm has eroded and slumped onto State property to the North and is now not located entirely on private property. (Administrative Record, U.S. Fish & Wildlife Service Response to Request for Comments, December 27, 2002, pg. 2; State's Final Brief, ODNR Division of Natural Areas and Preserves Memo, March 13, 2003, Exhibit EE) Second, the proposed project for which Barnes seeks authorization from the Corps calls for the remainder of its project to be dredged on a northwest diagonal line through a dedicated State Nature Preserve which would violate Ohio law. (Administrative Record, State's Initial Brief, pgs. 8-9 and 22, Corps Public Notice, Exhibit P; State's Objection, Exhibit B; Ohio Revised Code Chapter 1517) Third, even if the project were to

be entirely located on private property, the wetland complex through which this project seeks to skewer does not begin and end at the private property line between Barnes Nursery and the Sheldon Marsh State Nature Preserve, and neither do the adverse impacts created by Barnes Nursery's project. As has been stated repeatedly, and as has been restated most cogently by USFWS in its comments to the Secretary on this appeal:

"This project is located within Sheldon's Marsh, one of Ohio's last remaining intact coastal wetland systems. The majority of the Marsh is protected as a State Nature Preserve, but the outskirts of the area are private property. There is, however, no physical boundary between the State and private land. Although the current channel and berm is located on private property, it is now resulting in, and will continue to result in, direct impacts to State land."

(U.S. Fish & Wildlife Service Response to Request for Comments, December 27, 2002, pg. 2)

Barnes Nursery next claims in the Barnes Letter that "after the project was underway ... the Corps determined that an Individual Permit would be a more appropriate permit for this project." (Administrative Record, Appellant's Supplemental Information, December 3, 2002, pg. 2) This is not correct. In reality, the Corps was without authority to authorize Barnes Nursery's proposed activity under a Nationwide 27 Permit as "temporary and permanent impacts to Category 3 wetlands were not certified to be authorizable under a Nationwide Permit" in the State of Ohio. (Administrative Record, State's Initial Brief, pg. 6, ODNR Letter, July 21, 2000, Exhibit L; Ohio EPA Letter, July 21, 2000, Exhibit A; USFWS Letter, August 21, 2000, Exhibit C; USEPA Letter, October 12, 2000, Exhibit D)

The Corps notified the Barnes Nursery that the Nationwide Permit had been issued "in error" and that, "effective immediately, the portion of [the] project already constructed is deemed an unpermitted activity, and no authorization exists for the remaining unbuilt portion of your project." (Administrative Record, State's Initial Brief, pg. 7, Corps Letter, January 8, 2001, Exhibit N) The Corps went on to state that Barnes Nursery could either "apply for after the fact

authorization for the unpermitted activity" or the Corps would require Barnes Nursery to "restore the entire project site to preconstruction conditions." (Administrative Record, State's Initial Brief, pg. 7, Corps Letter, January 8, 2001, Exhibit N)

In addition, it can not be forgotten that the Corps itself found that even if the project could have been authorized by the Nationwide Permit, the applicant had constructed its project in violation of that authorization. (Administrative Record, State's Initial Brief, Corps Environmental Assessment and Statement of Findings for Department of the Army Permit Application No. 2000-02170(1), November 29, 2001, Exhibit M) The erroneously issued Nationwide Permit had authorized a channel and an earthen berm, 3,000 feet in length by dredging and side casting the dredged material parallel to the channel. The channel was to be 20 feet wide and 10 feet deep, while the berm was to be 44 feet wide and 4 feet in height. At the time work was stopped, 1,500 feet of the intended 3,000 foot channel and berm had been constructed. The channel was 50 feet in width and 5 feet in depth, the berm was 55 feet wide and 6 feet high. (Administrative Record, State's Initial Brief, Corps Environmental Assessment and Statement of Findings for Department of the Army Permit Application No. 2000-02170(1), November 29, 2001, Exhibit M)

Barnes Nursery next asserts in the Barnes Letter that "one of the many requirements in our conditions is to control Phragmites, as well as a whole list of potential invasive plants ... this control would be of great benefit to the wetland ecosystem ... the Barnes canal actually served as a barrier to the movement of Phragmites into the southwest end of Sheldon's Marsh." (Administrative Record, Appellant's Supplemental Information, December 3, 2002, pg. 2) However, as USFWS maintains in its comments to the Secretary, Barnes Nursery's required

control of these invasive species creates further adverse impacts to these prime wetlands in and of itself:

"Without careful management of the area and continuous efforts to control invasive vegetation, such as purple loosestrife and *Phragmites* sp., these islands may become infested with these species, which out compete native plant species and provide little benefit to native wildlife. If this area were to be regularly managed to control invasive species, this could likely involve the use of herbicides and heavy machinery, which further alters the natural state of the marsh and disturbs the ecosystem."

(Administrative Record, U.S. Fish & Wildlife Service Response to Request for Comments, December 27, 2002, pg. 3) Additionally, ODNR submits that while the channel may serve as a barrier to colonies of phragmites south of the channel, Barnes Nursery fails to mention the effect of the phragmites "colonizing on the spoil dike which will promote a rapid spread of phragmites directly into the interior of Sheldon Marsh during low water levels." (State's Final Brief, ODNR Division of Natural Areas and Preserves Memo, March 13, 2003, Exhibit EE)

After claiming that its project benefits the plant species of Sheldon Marsh, Barnes Nursery then shares its unique perception of the effect its project will have on rare and endangered species. Barnes Nursery begins by making the erroneous claim that "Piping Plover have not been seen on the barrier beach in many decades." (Administrative Record, Appellant's Supplemental Information, December 3, 2002, pg. 2) In reality, "plovers were seen utilizing Sheldon Marsh in September of 1999, and bald eagles are regularly seen there." (Administrative Record, U.S. Fish & Wildlife Service Response to Request for Comments, December 27, 2002, pg. 3)

Next, Barnes Nursery touts the supposed benefits its proposed activity would provide to the rare and endangered species of Sheldon Marsh through yet more artificial meddling in what remains of their natural world. The Appellant reasserts its old claim that "the islands can provide nesting and resting areas for water fowl [sic] with proper planting." (Administrative Record,

Appellant's Supplemental Information, December 3, 2002, pg. 4) This claim continues to be struck down by USFWS, because such islands would not benefit any of the rare or endangered species utilizing the marsh, but would instead provide "artificial nesting and foraging habitat for opportunistic species such as Canada geese and gulls." (Administrative Record, U.S. Fish & Wildlife Service Response to Request for Comments, December 27, 2002, pg. 3) Specifically, USFWS continues to warn that:

"The increased presence of these species will decrease the value of the marsh for other native bird species. Grazing and nesting activities of Canada geese can reduce the available native marsh vegetation, which would result in altering and/or reducing foraging and breeding habitat for other native species. Gulls are voracious predators of the eggs and chicks of other bird species and, therefore, should not be encouraged to nest in areas where rare bird species breed."

(Administrative Record, U.S. Fish & Wildlife Service Response to Request for Comments, December 27, 2002, pg. 3)

In response Barnes Nursery now asserts that it "has agreed to implement best management practices to control the nesting of invasive birds on the project" and that it "is willing to contract with USDA, the regulating agency, to do this type of control." (Administrative Record, Appellant's Supplemental Information, December 3, 2002, pg. 3) However, as USFWS provides in its comments to the Secretary, Barnes Nursery's continued offers of one proposed artificial control measure after another will only result in further adverse impacts to the rare and endangered species of the marsh:

"Overall, this area is rich in diversity and is a valuable habitat for the fish and wildlife in the area, including the piping plover and bald eagle. Eagles generally avoid areas that are disturbed by humans. Any modification of this habitat could negatively affect the piping plover, bald eagle, and other birds, by reducing the value of the habitat for these species. We do not believe that disturbing this system by creating and maintaining the channel and islands will actually improve the existing habitat for any of the species mentioned above."

(Administrative Record, U.S. Fish & Wildlife Service Response to Request for Comments, December 27, 2002, pg. 2)

Responding to earlier criticisms of the proposed "deep water habitat" to be created by the project, and the undesirable fish species that feature would introduce into the marsh, Barnes Nursery next asserts that "the channel has brought water to south shore marshes and has enhanced the capability as spawning sites for more desirable species such as sunfish, croppies and large mouth bass," and "will provide a refuge for fish over winter when the rest of the bay is frozen."

(Administrative Record, Appellant's Supplemental Information, December 3, 2002, pg. 3) Once again, the USFWS disagrees with these claimed benefits of Barnes Nursery's project and responds to the Secretary as follows:

"Furthermore, we question the purported value to fish of the "deep water habitat" provided by the excavated channel. The channel will have minimal value as overwintering habitat and little value during the remainder of the year unless submersed aquatic vegetation becomes established in the channel. Sediment accumulation in the channel and the periodic maintenance dredging that will likely be needed to address that accumulation will preclude the establishment of vegetation. Regular maintenance dredging will also continually disturb the adjacent marsh ecosystem, reducing the quality of the habitat for birds and other wildlife. The channel will also provide a potential pathway for invasive species to move into areas that they do not currently occupy."

(Administrative Record, U.S. Fish & Wildlife Service Response to Request for Comments, December 27, 2002, pg. 3)

Finally, on the issue of the increased sedimentation and erosion caused by its project, Barnes Nursery admits that its "project did create temporary turbidity in the water during construction," but then proclaims that "the natural seedbank has provided excellent, diverse vegetation for erosion control" and "additional plantings planned for the islands will further insure protection from turbidity caused by erosion." Further, Barnes Nursery asserts that "the

establishment of plants along the shoreline of the dike have held the bank in place." (Administrative Record, Appellant's Supplemental Information, December 3, 2002, pg. 3)

The claims of Barnes Nursery regarding the current condition of the project are false. Staff of both USFWS and ODNR have observed "areas where the channel was causing erosion along the wetland area, and the existing berm was eroding into the marsh," and "the gradual erosion on the north face of the dike into Sheldon Marsh State Nature Preserve." (Administrative Record, U.S. Fish & Wildlife Service Response to Request for Comments, December 27, 2002, pg. 2; State's Final Brief, ODNR Division of Natural Areas and Preserves Memo, March 13, 2003, Exhibit EE and ODNR Division of Geological Survey Memo, Figures 11 and 12, April 2, 2003, Exhibit DD) The reason for this already present erosion and its foreshadowing of things to come was explained to ODNR as follows:

"Vegetation may provide protection from erosion due to surface run off, However, vegetation does not provide long-term protection from wave attack. At present lake levels, even small waves generated by northerly winds blowing across the shallow open water of the wetland have caused local erosion along the face of the "dike" (figures 11 and 12). At higher lake levels, especially during storm surges generated by northeast storm winds, wave activity will be greater and erosion will likely occur even if the dike is vegetated."

(State's Final Brief, ODNR Division of Geological Survey Memo, April 2, 2003, Exhibit DD)

In response to Barnes Nursery's offerings of even more artificial control at this site, this time to control the process of erosion and sedimentation that would not have occurred but for the existence of its unauthorized, partially completed project, USFWS explains the damaging effect of this proposed never-ending cycle of artificial interference with the natural processes of this superior quality wetland to the Secretary as follows:

"Although future revegetation of this area may reduce erosion, turbidity and sedimentation in the marsh will continue to be a threat if the channel and berm (islands) remain. This was not the case when the area was mudflat. In addition, rather frequent dredging may be needed to maintain the channel, thereby increasing

the likelihood that project-induced turbidity and sedimentation will continue to be threat to the Marsh. Most fish species will not utilize waters with high suspended solids, which could reduce the value of this area for spawning, thus leading to fewer fish eggs and fry, two valuable food sources for birds. Many macro- and micro-invertebrates also prefer areas with low sediment loads. These invertebrates also provide an important food source for birds."

(Administrative Record, U.S. Fish & Wildlife Service Response to Request for Comments, December 27, 2002, pgs. 2-3)

In the Barnes Letter, Barnes Nursery also responds to a number of "additional statements ... that this project has or may cause environmental degradation to the marsh." Among the potentially relevant responses that have not already been addressed above is Barnes Nursery's claims that its partially completed project "in no way depletes water to the rest of the marshland." (Administrative Record, Appellant's Supplemental Information, December 3, 2002, pg. 4) In support of this claim, Barnes Nursery states that its property is uphill of the marsh and therefore, "the channel can not be filled without the entire marsh filling with lake water." (Administrative Record, Appellant's Supplemental Information, December 3, 2002, pg. 4) However, contrary to Barnes Nursery's assertions, ODNR staff observed that in fact "in August of 2002 during drought conditions with a set of south winds the marsh was entirely without water and the channel retained a consistent level of water during the entire month." (State's Final Brief, ODNR Division of Natural Areas and Preserves Memo, March 13, 2003, Exhibit EE)

Barnes Nursery further asserts that its proposed activity is "similar to many projects done by [ODNR] Division of Wildlife to restore fish and birds to wildlife areas." (Administrative Record, Appellant's Supplemental Information, December 3, 2002, pg. 4) The assertion here, bespeaks the response, the operative word being "restore." Unlike the wildlife areas listed by Appellant in the Barnes Letter which Barnes Nursery claims were restored by ODNR, the wetlands complex at issue here were in no need of restoration as it was already rated at the

highest level of categorization. Sheldon Marsh has been described by all Federal and State agencies in the same terms used by USFWS and Ohio EPA in their responses to the allegations on record in this appeal:

"This project is located in Sheldon Marsh, one of Ohio's last remaining coastal wetland systems ... Sheldon Marsh is a large, contiguous, high quality, wetland system that has been designated a Category 3 wetland (supporting superior wetland functions) by the Ohio Environmental Protection Agency."

"The Ohio EPA has determined that Sheldons Marsh is a Category 3 wetland under Ohio Administrative Code (OAC) Rule 3745-1-54. Category 3 wetlands have superior hydrologic, habitat, and/or recreational functions. Sheldons Marsh is superior in all three respects: it is one of only three remaining, hydrologically unrestricted barrier-beach lagoon wetlands in Ohio; it is documented breeding and migratory habitat for waterfowl and migratory songbirds; the barrier beach has been designated critical habitat for the Great Lakes piping plover; it is habitat for other state and federal threatened and endangered species; and, it is a well known and highly utilized nature preserve."

(Administrative Record, U.S. Fish & Wildlife Service Response to Request for Comments, December 27, 2002, pg. 2; State's Final Brief, Ohio EPA Interoffice Memo, March 25, 2003, Exhibit AA) Such a wetland is clearly in no need of restoration. As Barnes Nursery's unauthorized project exemplifies, it is difficult to improve upon perfection, but easy to mar it.

Throughout the discourse of the Barnes Letter, Barnes Nursery seems particularly pleased with one supposed benefit produced by its partially completed project - "the newly vegetated wetland coast." Indeed, Barnes Nursery asserts that its project's impact thus far "has resulted in the establishment of 5 acres of newly vegetated coastal wetlands." (Administrative Record, Appellant's Supplemental Information, December 3, 2002, pg. 3) Perhaps it is because Barnes Nursery operates a nursery that it can only view a benefit through a nursery operator's lens. It can see only a benefit in the "newly vegetated coastal wetlands" that its partially completed project has produced, where there was once what Barnes Nursery has described as "barren mudflats." (Administrative Record, Appellant's Initial Brief, Exhibit 7) Though this may be a

plant grower's perspective, it is not the perspective of USFWS or ODNR. Barnes Nursery either does not understand or fails to appreciate the "barren mudflat" habitat, one which would be further or completely eradicated should Barnes Nursery be permitted to complete its proposed activity. This "barren mudflat" habitat is an integral part of a larger, rarer habitat upon which the Federal and State endangered shorebirds depend. As described to the Secretary in its comments, USFWS states:

"Sheldon Marsh is one of the most commonly visited places in Ohio to observe migrating birds, shorebirds, and rare species. The 'barren mudflat' habitat that currently exists on the site provides a wealth of insects and other invertebrates for shorebirds and, when inundated, provides fish and other aquatic food sources for these birds. During certain times of the year, this area may be used for fish spawning and as a fish nursery area. Overall, this area is rich in diversity and is a valuable habitat for the fish and wildlife in the area, including piping plover and bald eagle."

(Administrative Record, U.S. Fish & Wildlife Service Response to Request for Comments, December 27, 2002, pg. 2)

Species often become endangered and threatened due to the loss of their natural habitat. In the not too distant past, Lake Erie had an abundance of naturally functioning coastal barrier beach wetland systems, containing as part of the gradual layers of their natural composition, "barren mudflats." Now, due to the short sighted artificial diking and filling of the past, such habitat is extremely rare. Surprisingly, Barnes Nursery alludes to a number of the past "dikes" that were placed in or adjacent to this wetland. Specifically, Barnes Nursery asserts that "the first dike was the Cedar Point Road built about 1919," that "the second dike was constructed by the Federal Government as their access road across the marsh to construct and operate the water intake and pump house for the Munitions Plant (now NASA) built prior to World War II" and that "in 1970 several dikes could be found in East Sandusky Bay," however Barnes Nursery

admits that "these dikes no longer exist." (Administrative Record, Appellant's Supplemental Information, December 3, 2002, pg. 4)

Regardless of the existence of prior artificial changes, the difference between Barnes Nursery's project and the past projects conducted in this wetland, and in others, is that Barnes Nursery is subject to the law as it exists today, and not as it did (not) exist in past. This difference is exactly why Barnes Nursery's allegations regarding past "diking" of this naturally functioning wetland complex are irrelevant and of no consequence to this appeal. The USFWS, USEPA, Ohio EPA and ODNR did not exist "in 1919" or "prior to World War II" when roads, not "dikes," were built across other portions of this marsh, and when so many other natural coastal wetlands across the State of Ohio, were diked, drained, filled and destroyed. The CZMA and the Clean Water Act, which have just celebrated their 30th anniversaries this year, had not even been passed into law "in 1970" when "several dikes" which "no longer exist" "could be found in East Sandusky Bay."

These laws were passed and these agencies were created to prevent any future repetition of the devastating environmental mistakes of the past. Accordingly, there is no justification to the argument that because artificial changes have been made to this wetland complex in the past, the Appellant should be authorized to maintain, let alone complete, a project that is having and "would have the effect of permanently altering, and thereby adversely affecting, the natural resources of those wetlands" today. *In the Consistency Appeal of A. Elwood Chestnut from an Objection by the South Carolina Coastal Council, U.S. Department of Commerce, Office of the Secretary*, 1992 NOAA LEXIS 45 (November 4, 1992), at 25-26.

The Federal and State environmental agencies have unanimously found that the proposed activity will cause a multitude of serious adverse impacts to a Category 3, naturally functioning

wetland, which by its very nature and classification could not have been and clearly was not in need of "restoration" or "enhancement" prior to Barnes Nursery's construction activities. For this reason and because any supposed national interest furthered the proposed activity is minimal at most, the second requirement for Secretarial override can not be met by Barnes Nursery, and the Secretary must refuse to override the State's Objection. 15 CFR 930.121(b); see also *Henry Crosby Appeal, supra*; *Shickrey Anton Appeal, supra*; *Michael P. Galgano Appeal, supra*.

3. **There are reasonable alternatives available which would permit Appellant's proposed activity to be conducted in a manner consistent with Ohio's Coastal Management Program.**

Barnes Nursery also fails to meet the third requirement for override of a State's Objection under 15 CFR 930.121(c), as reasonable alternatives are available which would provide water to Barnes Nursery and would also be consistent with Ohio's CMP. In "determining whether a reasonable alternative is available, the Secretary may consider but is not limited to considering, previous appeal decisions, alternatives described in objection letters and alternatives and other new information described during the appeal." 15 CFR 930.121(c)

The State, in its Initial Brief, presented a number of alternatives to the proposed activity that would be consistent with Ohio's CMP. (Administrative Record, State's Initial Brief, pg. 24) These alternatives included County Water, NASA Aqueduct, Directional Boring/Upland Pipeline & Pump, Groundwater Wells and/or Ponds. (Administrative Record, State's Initial Brief, pg. 24) The State also noted that both Ponds and Wells appeared to be both "available" and "reasonable" as those terms have been defined by the Secretary, and that Ponds had been found to be both "available" and "reasonable" alternatives by the Secretary in prior consistency appeals involving irrigation projects. See *Yeamans Hall Club Appeal, supra*, at 13; *A. Elwood Chestnut Appeal, supra* at 13. Therefore, the State's Initial Brief proposed and incorporated the alternatives above,

and specifically suggested that the use of ponds and/or wells would provide an available and reasonable alternative to the proposed activity consistent with Ohio's CMP. (Administrative Record, State's Initial Brief, pg. 24)

"Once an alternative is proposed by the state, an appellant, in order to prevail on element [three], will have the burden of demonstrating that the alternative is unreasonable or unavailable." *Yeamans Hall Club Appeal, supra* at 13. Under this analysis, the Secretary will first determine if the alternative identified by the State is available. *Id.* at 13. "[U]navailability means that the alternative proposed by the [State] will not allow the project to achieve its primary purpose." *Id.* at 13. "A project that is technically infeasible (a project for which technology and/or resources do not exist) would also be an unavailable project." *Id.* at 13. Further, an examination of availability under element [three] must look to a project's primary purpose." *Id.* at 15. Otherwise, "an examination of site specific secondary purposes and/or benefits ... that a project may obtain would likely make site alternatives for all projects unavailable." *Id.* at 15. Therefore, the Secretary "will limit [his] inquiry regarding availability to whether the essential or primary purpose can be obtained if the alternative is implemented." *Id.* at 15.

All Federal and State agencies, including the Corps, have found that the central purpose of the proposed activity is water supply for Barnes Nursery. Any alleged restoration benefit to the Category 3 wetlands at issue has been entirely discounted by the agencies as described above. In the Barnes Letter, Barnes Nursery appears willing to admit that the primary purpose of its project is to supply irrigation water, in that it discusses only "Alternative Sources of Water" to its proposed activity. (Administrative Record, Appellant's Supplemental Information, December 3, 2002, pgs. 5-6)

Barnes Nursery lists the following "alternative sources of irrigation water" in the Barnes Letter: "Deep Wells," "Ponds," "Direct Pumping from East Sandusky Bay," "Relocation of Stock to Catawba Island," "Purchase of County Water," "Other Options," and "Water Conservation." (Administrative Record, Appellant's Supplemental Information, December 3, 2002, pgs. 5-6) Of these "alternative sources," only County Water, NASA Aqueduct, Directional Boring/Upland Pipeline & Pump, Groundwater Wells and/or Ponds were proposed by the State in this appeal. (Administrative Record, State's Initial Brief, pg. 24) The "alternative sources," described by Barnes Nursery as "Relocation of Stock to Catawba Island" and "Water Conservation" were never proposed as alternatives to this project by the State. (Administrative Record, State's Initial Brief, pg. 24)

Further, the "alternative source" described by Barnes Nursery as "Direct Pumping from East Sandusky Bay," is not an alternative to the project at all, but rather contains Barnes Nursery's erroneous assertions that its project is allegedly necessary because of the disappearance of the Black Channel and therefore the disappearance of a source of water exchange between East Sandusky Bay and Lake Erie. (Administrative Record, Appellant's Supplemental Information, December 3, 2002, pg. 5) Contrary to Barnes Nursery's claims, though the Black Channel may now be covered by the barrier beach, another natural channel formed south of the Barrier Beach which continues to serve the same purpose of water exchange that the Black Channel once provided. (State's Final Brief, ODNR Division of Geological Survey Memo, Figures 8, 9, and 10, April 2, 2003, Exhibit DD) Accordingly, ODNR's Division of Geological Survey responded:

"At one time a meandering channel, locally known as the Black Channel, extended along the backside of the barrier beach. This channel is shown on Judson's (1926) map of the East Bay Sporting Club (figure 8) and on the 1937 aerial photograph. A second meandering channel located about 1200 feet south of the Black Channel can also be seen on the map and aerial photograph. As migration of the barrier beach covered the Black Channel in the mid 1980s,

exchange of water between lake and marsh transferred to this second channel, and another channel formed along the backside of the barrier beach provides for exchange of water with the eastern part of the marsh. These channels are clearly visible on aerial photographs taken on August 21, 2000 and on April 4, 2001 (figures 9 and 10)"

(State's Final Brief, ODNR Division of Geological Survey Memo, April 2, 2003, Exhibit DD)

In actuality, the Black Channel never existed anywhere remotely near the present location of Barnes Nursery's project. (State's Final Brief, ODNR Division of Geological Survey Memo, Figure 8, April 2, 2003, Exhibit DD) Not only does Barnes Nursery's project fail to follow any natural drainage pattern that has ever been documented to exist in Sheldon Marsh, "the long ditch and dike that extend generally east west truncate this natural drainage pattern." (State's Final Brief, ODNR Division of Geological Survey Memo, April 2, 2003, Exhibit DD) By failing to duplicate the natural waterways that have existed in this wetland, and instead creating waterways where none existed before, Barnes has actually eviscerated the natural flow of water through the Marsh. (State's Final Brief, ODNR Division of Geological Survey Memo, Figures 6 and 7, April 2, 2003, Exhibit DD) This is not an alternative to the proposed activity, but yet another example of the adverse impacts caused by Barnes Nursery's unauthorized activity.

In its discussion of the remainder of the "alternative sources," Appellant attempts but fails to meet its burden of demonstrating that the State's proposed alternatives are unavailable. It should be noted, that while the "Other Options" addressed by Barnes Nursery, including the NASA Aqueduct and Directional Boring/Upland Pipeline & Pump, may have been "deemed not to be practical from both technical and economical standpoints" by Barnes Nursery, that was not the determination of the State. (Administrative Record, Appellant's Supplemental Information, December 3, 2002, pg. 6) The alternative combination of Directional Boring/Upland Pipeline & Pump was never discounted by the State and was one of the alternatives proposed in its Initial

two were drilled to a depth of 50 feet. (Barnes Nursery Letter to Ohio EPA, July 24, 2001, Exhibit X, pg. 20) Barnes Nursery further submitted to Ohio EPA that all three wells were "dry holes." (Barnes Nursery Letter to Ohio EPA, July 24, 2001, Exhibit X, pg. 20)

The State responded to Barnes Nursery's reported dry well scenario with comments received by ODNR's Division of Water regarding ground water availability at the Barnes Nursery property indicating that a well would need to be approximately 300 feet deep, as the limestone aquifer at the site is 200 feet thick. (Administrative Record, State's Initial Brief, ODNR Email, February 20, 2002, pg. 26, Exhibit Z) Barnes Nursery now asserts the following contradictory narrative::

"In 1983 Barnes Nursery attempted to drill a well field under contract with Tibbles Water Well Co., a well-respecting, water-well drilling firm in north central Ohio. Three wells were drilled to a depth of 250 feet, each producing only a trace of water and sulfur gas from the shale bedrock (well records on file with the Ohio Department of Natural Resources, Division of Water) ... In considering even deeper wells, we consulted the Ohio Department of Natural Resources, Division of Geological Survey Bulletin No. 44, *Geology of Water in Ohio*."

(Administrative Record, Appellant's Supplemental Information, December 3, 2002, pg. 5)

The ODNR Division of Water does not have any record of any wells ever being drilled on Barnes Nursery's property in 1981, 1983 or at any time, and the "well-respecting, water-well drilling firm" purportedly hired by Barnes Nursery to drill the three alleged wells has failed to return ODNR's calls regarding the location of well records for Barnes Nursery. These well records should have been filed with ODNR, but were not. (State's Final Brief, ODNR Division of Water Memo, March 12, 2003, Exhibit FF) Further, regardless of whether the three alleged wells were drilled in 1981 or 1983, and regardless of whether the three alleged wells were drilled to a depth of 50 feet and 125 feet or 250 feet, the three alleged wells were simply not "drilled deep enough to penetrate an adequate thickness of the carbonate aquifer present below the shale" at this site.

(State's Final Brief, ODNR Division of Water Memo, March 12, 2003, Exhibit FF) As was described in the State's Initial Brief, a well would need to be approximately 300 feet deep, as the limestone aquifer at the site is 200 feet thick. (Administrative Record, State's Initial Brief, ODNR Email, February 20, 2002, pg. 26, Exhibit Z).

Finally, the "Ohio Department of Natural Resources, Division of Geological Survey Bulletin No. 44, *Geology of Water in Ohio*" which Barnes Nursery claims to have consulted, but which it quotes out of context, was written in 1943. (State's Final Brief, ODNR Division of Water Memo, March 12, 2003, Exhibit FF; ODNR Division of Geological Survey Memo, April 2, 2003, Exhibit FF) ODNR has "newer maps of the ground water resources for Ohio" which show the 1943 publication relied upon by Barnes Nursery to be outdated and inaccurate. (State's Final Brief, ODNR Division of Water Memo, March 12, 2003, Exhibit FF) Specifically, "The Ground Water Resources map for Erie County, published in 1986" indicates that Barnes Nursery "is close to the contact where the carbonate aquifer yields a few hundred gallons per minute" and "the state aquifer map, which was completed in 2000, indicates that the carbonate aquifer has the potential of yielding 25-100 gallons per minute on the northwestern edge of the Barnes property." (State's Final Brief, ODNR Division of Water Memo, March 12, 2003, Exhibit FF)

Either of these more recent sources show that groundwater wells drilled to sufficient depths and in the proper locations would be more than sufficient either alone, or in conjunction with new ponds constructed on Barnes Nursery's non-wetland property, to provide "an emergency back-up system for periods of low lake levels" when Barnes Nursery's preexisting method of "Direct Pumping from East Sandusky Bay" is purportedly unable to meet its irrigation needs. (Administrative Record, Appellant's Supplemental Information, December 3, 2002, pg. 5) Accordingly, Barnes Nursery has failed to meet its burden of proof regarding the availability of